Nos. 70-250, 70-5305

In the Supreme Court of the United States

OCTOBER TERM, 1971

ROBERT B. CARLESON, ET AL., APPELLANTS

v.

NANCY REMILLARD, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

FLORENCE DIGESUALDO, ET AL., APPELLANTS

v.

CON F. SHEA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief *amicus curiae* is submitted pursuant to the Court's invitation of October 12, 1971.

QUESTIONS PRESENTED

This brief will discuss the following questions:

1. Whether state welfare programs, in order to be eligible for federal matching grants under the Aid to Families with Dependent Children (AFDC) program, must extend aid to all categories of children included within the definition of "dependent child" under Section 406(a) of the Social Security Act, 42 U.S.C. 606(a).

2. Whether the Colorado AFDC program, which excludes from AFDC coverage children between the ages of 16 and 18 who do not attend school, and the California AFDC program, which precludes aid to families in which parental absence is due to military service, are valid exercises of state discretion to determine AFDC eligibility under the Social Security Act.

STATEMENT

The Federal Aid to Families with Dependent Children ("AFDC") program, 42 U.S.C. §§ 601-610, is one of six federally-aided public assistance programs established by the Social Security Act for various categories of needy persons.[1] Each of these programs

[1] These programs are: Grants to States For Old-Age Assistance and Medical Assistance for the Aged, 42 U.S.C. 301, *et seq.*; Aid to Families With Dependent Children, 42 U.S.C. 601-610; Grants to States For Aid to the Blind, 42 U.S.C. 1201, *et seq.*; Grants to States For Aid to the Permanently and Totally Disabled, 42 U.S.C. 1351 *et seq.*; Grants to States for Aid to the Aged, Blind, or Disabled, 42 U.S.C. 1381, *et seq.*; Grants to States For Medical Assistance Programs, 42 U.S.C. 1396, *et seq.*

is jointly financed by the states and the federal government and administered by the individual states or by political subdivisions under the supervision of the state. It is optional with each state whether it wishes to participate in any or all of the programs. If a state chooses to participate in one of the programs, it submits a plan of administration to the Secretary of Health, Education, and Welfare; if the plan meets the requirements set forth in the pertinent title of the Social Security Act, the Secretary approves the plan. The federal government then provides matching grants-in-aid to the state within the limits of the provisions of the Social Security Act setting forth the scope of federal financial participation.

For AFDC, the requirements for obtaining the Secretary's approval of a state plan are contained in Section 402 of the Social Security Act, 42 U.S.C. 602. Sections 406, 407, and 408 of the Act, 42 U.S.C. 606, 607, 608, define the class of persons in whose behalf the state may receive federal matching funds under the AFDC program. Section 402(b) provides that the Secretary "shall approve" any plan which fulfills the conditions specified in Section 402 (a). Conversely, the Secretary has interpreted Sections 406, 407, and 408 not as a listing of persons who must be included in state plans, but as a broad definition of the class of persons with respect to whom federal matching payments will be made if they are included in a state AFDC plan.

In both of the instant cases, appellants contend that state AFDC plans approved by the Secretary

are invalid because the class of persons eligible for aid under the state plan is smaller than the class defined in Section 406 of the Act.

Digesualdo is a class action by two children over the age of 16 but under the age of 18, and their mothers, seeking to compel Colorado and Denver County Welfare officials to resume payment of AFDC benefits which were terminated when the children ceased regularly attending school. The benefits were denied under a Colorado State regulation (IV Colo. Dept. of Soc. Serv. Staff Manual of Pub. Assis. § 4234.1) which permits AFDC payments only for those children aged 16 to 20 who are "in regular attendance at a public or private school, high school, trade school, college or university * * *." Appellants contend that the Social Security Act requires that Colorado provide assistance to all persons who meet the definition of "dependent child" set forth in section 406(a) of the Act, 42 U.S.C. § 606(a), which includes needy children under 18, who are not in school.[2] Appellants also contend that denial of assistance to such children violates sections 402(a)(19) (requirement of Work Incentive Program referral) and 402(a)(7) (income and resources taken into account in determining need) of the Act. 42 U.S.C. §§ 602(a)(19); 602(a)(7). Alternatively, appellants argue that Colorado's school attendance requirement

[2] We believe that the eligibility restrictions at issue in *Digesauldo* and *Carleson* are valid under this Court's decision in *Dandridge* v. *Williams*, 397 U.S. 471, and we do not discuss appellant's Equal Protection and Due Process arguments.

for 16 and 17-year-olds violates the Equal Protection and Due Process Clauses.[3]

The three-judge district court, convened pursuant to 28 U.S.C. §§ 2281, 2284, upheld the Colorado regulation. Upon examination of the Social Security Act and the legislative history of Section 406(a), the court concluded that states are not required to use the federal definition of dependent child in their AFDC programs. The court also held that denial of AFDC benefits to needy children who are not in school does not violate the Constitution.

Carleson is a class action by a two-year-old child and her mother, whose husband is away from home on active duty in the United States Army, challenging the validity of California's Department of Social Welfare Regulation EAS § 42-350.11. California incorporates in its AFDC eligibility provisions the "continued absence" concept of the Social Security Act, under which a needy child "deprived of parental support * * * by reason of the * * * continued absence from the home * * * of a parent" is deemed eligible for AFDC benefits. Social Welfare Regulation EAS § 42.350.11 excludes absence due to "active duty in the Armed Services" from the definition of "continued absence" which California uses to test eligibility for AFDC benefits. The majority of the three-judge court (Judge Conti dissenting) upheld the

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[3] Plaintiffs do not question Colorado's exclusion of 18-20-year-olds not attending school, presumably because children in this age bracket are not eligible for federal matching funds under Section 406(a) unless they attend school.

plaintiffs' contention that the Social Security Act does not permit a state to exclude as a group dependent children whose parents are absent due to military service, though it indicated that the state could provide for a case-by-case factual determination as to whether military service creates the need required to justify the payment of AFDC benefits.[4]

ARGUMENT

I. The Social Security Act Does Not Require the States to Provide AFDC Benefits for All Persons with Respect to Whom Federal Matching Payments Can Be Made.

In both of these cases welfare recipients attack the validity of state law provisions which limit Aid to Families with Dependent Children to a class of children narrower than that for which federal matching funds would be available under the definition of "dependent child" in Section 406(a) of Title IV of the Social Security Act, 42 U.S.C. 606(a). Section 406(a) provides:

> The term "dependent child" means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grand-

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[4] The court declined to rule on plaintiff's constitutional attack on the California regulation, though it noted that the "interpretation of § 606 urged by California would raise serious questions under the equal protection and due process clauses of the Constitution" (*Carleson* J.S. App. 4).

> mother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen, or (B) under the age of twenty-one and (as determined by the State in accordance with standards prescribed by the Secretary) a student regularly attending a school, college, or university, or regularly attending a course of vocational or technical training designed to fit him for gainful employment.

The appellants in *Digesualdo*, the appellees in *Carleson*, and, implicitly, the district court in *Carleson*, construe the Social Security Act as requiring states to provide AFDC to all persons who meet the definition of "dependent child" in Section 406(a). In *Digesualdo*, appellants contend that Colorado must furnish assistance to children between the ages of 16 and 18 regardless of whether they are attending school. In *Carleson*, appellees contend that California must make assistance payments to otherwise qualified children if the "continued absence" of a parent is due to military service.

Earlier this Term, in *Alexander* v. *Swank* (Nos. 70-5032 and 70-5021) and *Carter* v. *Stanton* (No. 70-5082), now pending before this Court for decision, we submitted a brief *amicus curiae* setting forth our views on questions closely related to those presented in the instant cases. Indeed, in *Alexander* appellants attacked the validity of an Illinois provision excluding from AFDC coverage dependent children aged 18-20 attending college, thereby bringing into

question the mandatory nature of the federal definitional provisions relating to the age and school status of welfare recipients; and in *Carter* appellants attacked the validity of an Indiana provision defining "continued absence" for purposes of AFDC eligibility as a minimum of six months, thereby bringing into question the content of the term "continued absence" as used in the Social Security Act and the mandatory applicability *vel non* of that term to state AFDC plans.

We pointed out to this Court in *Alexander* and *Carter* that as a policy matter, the Department of Health, Education and Welfare believes and has strongly recommended that state AFDC programs should provide the maximum coverage allowed by the Social Security Act (See *Alexander* Br., pp. 8-10), and that the Department disapproves of the policies reflected in both of the state provisions challenged in that case. Similarly, in this case the Department does not believe that either the Colorado or California restriction on AFDC eligibility is desirable.

As in *Alexander* and *Carter*, however, the question in these cases is not whether the state AFDC plans are entirely harmonious with the general policies of the Department of Health, Education and Welfare, but whether they are consistent with the Social Security Act. More specifically, the issue is whether and in what circumstances that Act permits the states to define eligibility in terms narrower than the statute's definitions of the categories of children for which federal matching funds will be available.

With respect to this question, the Department's position, reflected consistently throughout its administration of the AFDC program, is that states may make reasonable classifications limiting the persons to whom they will provide AFDC.

In our brief in *Alexander* and *Carter* (pp. 12-28), to which we refer the Court,[5] we set forth at length the reasons in support of HEW's view that the definitional provisions of the Social Security Act are not mandatory. Basically, we contend that this interpretation is consistent with the structure of the statutory provisions governing the administration of AFDC. Analysis of these provisions indicates that Section 402, which enumerates twenty-three criteria which state plans must meet in order to obtain the Secretary's approval, is the sole provision specifying mandatory requirements for those plans. The Department's interpretation is also fully supported by the legislative history of the definitional provisions of the Act, which repeatedly illustrates Congress' intention that the expanding federal definitions set outside limits, and are optional with the states. We believe that this Court's holding in *King* v. *Smith*, 392 U.S. 309, which invalidated an Alabama provision precluding AFDC payments to families in which the mother "cohabits" with a man, is consistent with the Department's view that state plans are not invalid merely because they do not define eligibility in terms as broad as those enumerated in the Act, but

[5] We have served a copy of our brief in *Alexander* and *Carter* on counsel in these cases.

are invalid only if the limitation in question is inconsistent with the purposes of the Act.[6]

We disagree with the *Carleson* court's suggestion that the Court's reference in *King* (392 U.S. at 333) to Section 402(a)(10) of the Act, providing that states shall "furnish 'aid to families with dependent children * * * with reasonable promptness to all eligible individuals * * *'" indicates a contrary view. Read in context, that statement indicates not that the Court interpreted Section 402(a)(10) as imposing federal eligibility definitions on the states, but

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[6] The Court appears to have adopted a similar standard with respect to procedural requirements for AFDC eligibility contained in state AFDC plans; *i.e.*, the requirement is valid unless it runs afoul of a purpose of the Act. Compare, *e.g.*, *Wyman* v. *James*, 400 U.S. 309, in which the Court upheld a requirement that AFDC recipients permit caseworkers to make home visits to ascertain whether the recipient meets AFDC eligibility criteria, with *Meyers* v. *Juras*, 327 F. Supp. 759 (D. Ore.), affirmed by this Court, October 12, 1971, No. 71-63, this Term, in which the Court summarily affirmed a holding that states cannot terminate AFDC eligibility on the ground that the recipient mother refuses to sign a complaint against her husband in a state support proceeding. The lower court in *Meyers* placed considerable emphasis on the fact that in 1968 Congress enacted a number of detailed amendments to the provisions requiring states to seek contributions from persons legally responsible for the support of children receiving assistance (42 U.S.C. 602(a)(17), (18), (21), and (22)), as well as the work incentive referral requirements (*supra*, p. 4), but that Congress did not suggest at the time these vigorous inducements to encourage the support of AFDC recipients by legally responsible individuals were enacted that sanctions should be imposed on non-cooperating AFDC recipients. The court concluded that Congress did not intend the states to "develop support resources by threatening mothers and children with the withdrawal of AFDC benefits." 327 F. Supp. at 761.

that it considered the prompt payment requirement applicable with respect to persons eligible for assistance under the state plan. We believe that *King* v. *Smith* holds, at most, that state eligibility restrictions are impermissible if incompatible with the Congressional purposes and must be scrutinized with special care when they apply in areas where Congress has not specifically indicated that states have broad discretion.

II. The Colorado and California Limitations on AFDC Eligibility in Question Here Are Not Prohibited By The Social Security Act.

1. *The Colorado Provision.* In light of the views which we have expressed above and in *Alexander* and *Carter*, we believe that Colorado's AFDC plan, which does not provide aid to persons aged 16 and 17 who do not attend school, is a valid exercise of state discretion to define AFDC eligibility. As we pointed out in our brief in *Alexander* (pp. 16-18), Congress has repeatedly and expressly indicated in broadening the age and school attendance aspects of the dependent child definition that state adoption of these aspects of the definition is optional. In 1956, when Congress removed the school attendance requirement and made federal matching funds available for state assistance to all children under 18, the Senate Report stated that this change "would *permit* Federal sharing," (S. Rep. No. 2133, 84th Cong., 2d Sess. 30 (1956); emphasis supplied); since the Act requires the federal government to provide funds to match state payments under a qualified plan, the

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permissive language of the Senate Report can only mean that the amendment permits the payment of federal matching funds if the state chooses to include 16 and 17-year-olds who do not attend school.[7]

Although the Department considers it desirable for state AFDC plans to include needy children regardless of whether they attend school, and although the Department believes that this limitation may work considerable hardship in situations where it is difficult for a 16 or 17-year-old not attending school to obtain employment, we do not believe that the distinction for these purposes between school children and children not in school is irrational. To the extent that employment for children in this age bracket is available, the Colorado regulation appears to reflect that state's determination that an employable child is less likely to be needy; and to the extent that the regulation affects children who are unable to obtain employment, the regulation encourages these children to remain in school and thereby increase their employment opportunities. Neither of these policies, in our view, is inconsistent with the purposes of the Social Security Act.

Appellants in *Digesualdo* suggest two additional reasons why Colorado's school attendance requirement is inconsistent with the Social Security Act. First, they argue that the requirement is inconsistent with Section 402(a)(19)(A)(i), 42 U.S.C. 602(a)(19)

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[7] The legislative pronouncements accompanying other amendments in this area are even more explicit. See *Alexander* Br., pp. 16-18.

(A)(i), which requires that states refer 16 and 17-year-old children who are receiving AFDC benefits and who are not in school to work incentive (WIN) programs. Appellants reason that, since the states must refer children in this category to work incentive programs, it follows that they must provide them with AFDC coverage. The short answer to this contention is that WIN referral is required only in the case of children "receiving aid to families with dependent children," that is, only if the state has chosen to include children in this category in its AFDC plan.

Appellants also contend that the blanket exclusion of 16 and 17-year-olds not attending school violates Section 402(a)(7) of the Act, 42 U.S.C. § 602(a)(7), which requires that, in administering AFDC plans, states "shall, in determining need, take into consideration any other income and resources of any child * * * as well as any expenses reasonably attributable to the earning of any such income * * *." With respect to this provision, the Department has promulgated a regulation specifying that "in establishing financial eligibility" for AFDC payments "only such net income as is actually available for current use on a regular basis will be considered, and only currently available resources will be considered." 45 CFR § 233.20(a)(3)(ii), 34 Fed. Reg. 1395. Appellants reason that Section 402(a)(7), as implemented by the HEW regulation, precludes Colorado from excluding all 16 and 17-year-olds not in school as a class regardless of individual needs. The language of the statute and the regulation, however, indicate

merely that states shall take into account the actual income of a claimant in determining need only if that claimant is a member of a class otherwise included in the state's AFDC plan. These provisions do not preclude the states, as appellants suggest, from excluding a group of persons merely because that group is potentially eligible for matching funds under the federal definition.

2. *The California Provision.* California's exclusion of persons absent by virtue of military service from the definition of "continued absence," like the Indiana provision challenged in *Carter* (*supra*, p. 8), presents, in our view, a more difficult quetsion than does the Colorado provision under attack in *Digesualdo*. For, as we stated in our brief in *Carter* (pp. 29-30), though we believe that state discretion not to include all children covered by the federal definition of eligibility is applicable to the definition of the term "continued absence," there is, in marked contrast to the age and school attendance aspects of the definition, no legislative history indicating the scope Congress intended the states to have in defining the continued absence aspect of AFDC eligibilty.[8] Consequently, Congress has not manifested any intent that a restrictive state definition may be compatible with the Act's policies. On the other hand, as we pointed out in *Carter*, Congress' failure to define the federal standard of continued ab-

[8] But see 79 Cong. Rec. 9269 (1935) (suggesting that states may limit aid to cases of parental deprivation due to the death of a parent).

sence may indicate that the states were intended to have considerable discretion in determining what sort of parental absence justifies AFDC assistance.

HEW strongly encourages states to include dependent children whose parents are absent due to military service in their AFDC plans. Indeed, as the court below in *Carleson* pointed out (J.S. App. 3), HEW's Handbook of Public Assistance Administration, in discussing the term "continued absence" specifies that

> Within this interpretation of continued absence the State agency in developing its policy will find it necessary to give consideration to such situations as divorce, pending divorce, desertion, informal or legal separation, hospitalization for medical or psychiatric care, search for employment, employment away from home, *service in the armed forces or other military service*, and imprisonment." HEW, Handbook of Public Assistance Administration, Part IV, § 3422.2 (emphasis added).

Although the Department does not believe that it is mandatory for the states to include for these purposes absences due to military service, we find some merit in the observation of the court below that military service may in many situations create a need as compelling as that suffered by other classes of persons eligible for AFDC assistance. Nonetheless, we believe that the California provision reflects a determination by that state that absences due to military service do not generally create the same degree of family disruption as does, for example, desertion of a parent, and that, in any event, the needs gen-

erated by military absence are more properly the responsibility of the military than of the states. (See appellants' J.S. in *Carleson*, pp. 14-15.) Though we consider the question to be a difficult one, we do not believe that this determination by California is an abuse of its discretion to define AFDC eligibility.[9]

[9] The court below held one other California qualification of the term "continued absence" to be inconsistent with the Act. In *Damico* v. *California*, No. 46538 (N.D. Calif., September 12, 1969), plaintiffs challenged the validity of a California welfare regulation which imposed a three-month waiting period for children deserted by a parent unless the remaining parent took legal action to terminate the marriage. The court held that the state's rigid time period was impermissible, although it acknowledged that use of a reasonable time period as a "rebuttable evidentiary guide" would be valid.

CONCLUSION

Although we believe that both of the state provisions limiting AFDC eligibility under attack in these cases are permissible exercises of state discretion under the Social Security Act, the questions presented in these cases are substantial and they warrant plenary consideration by this Court. In view of the close relationship between the questions presented in these cases and those currently pending for decision by the Court in *Alexander* and *Carter*, however, we suggest that it would be appropriate for the Court to withhold disposition of these cases until it has decided *Alexander* and *Carter*.

Respectfully submitted.

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